Supreme Court, U. S.
FILED
NOV 20 1978
DAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-824

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

LAW OFFICES OF ROBERT S. MICHAELS,
ROBERT S. MICHAELS,
Counsel for Petitioner
Harold Brauer.

MARC J. BRAUER,
400 South Beverly Drive,
Penthouse Suite,
Beverly Hills, Calif. 90212,
(213) 277-3456,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinion Below 1

Jurisdiction 1

Question Presented 2

Statement of the Case 2

Reasons for Granting the Writ 4

The Court of Appeal's Holding That Petitioner Was an Employer for Purposes of Section 302 (c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. §186(c)(5) Is Erroneous and Contrary to Principles Enunciated in the Decisions of This Court as Well as Recent Appellate Rulings Decided After Petitioner's Case Was Heard, the Issue of Whether or Not a Fifty Percent (50%) Shareholder of a Small, Closely Held Corporation Is an Employer or Employee Is of Substantial Importance Because There Are Many Taft-Hartley Plans, Quite a Number of Which Allow Participation by Persons Such as Petitioner 4

I

The Holding by the California Court of Appeal Is in Conflict With the Recent Decisions of the Other Appellate Courts 4

II

The California Court of Appeal Failed to Consider the Purpose of Section 302(c)(5) Which Calls for the Inclusion of Petitioner in These Pension Plans 7

III Page

The California Court of Appeal's Reliance on Cerni vs. Ford Motor Company Is Totally Erroneous 8

IV

The Trustees' Decision Was Arbitrary and Capricious Because Their Decision Was Based on an Erroneous Interpretation of Case Law 10

V

Public Policy Dictates That Petitioner Be Granted His Pension Pursuant to Section 302(c)(5) of the Labor Management Relations Act 11

Conclusion 12

Appendix. Opinion of the Court of Appeal ..... App. p. 1

Modification of Opinion 9

TABLE OF AUTHORITIES CITED

Cases Page

Allied Chemical and Alkali Workers of America v. Pittsburg Plate Glass Co., 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 9

Blassie v. Kroger Company, 345 F.2d 58 (8th Cir. 1965) 8

Cerni Motor Sales Inc. (1973) 201 N.L.R.B. 918 .. 5

Cerni Motor Sales, Inc. v. Ford Motors (1973) 201 N.L.R.B. 918 .....8, 9

Cuff v. Gleason (E.D. N.Y. 1974) 382 F.Supp. 1144, Rev'd on other grounds, 515 F.2d 128 .. 10

James J. Reiherzer v. Daniel J. Shannon, and Central States, Southeast and Southwest Areas Pension Fund, No. 77-1911 5

N.L.R.B. v. Caravelle W.D. Prod., Inc., 466 So.2d 675 (7th Circuit, 1972) 8, 9

Rehmar v. Smith (C.A. 9th, 1976) 55 F.2d 1362.. 10

Sanchez v. Trustees of Pension Plan, 359 So.2d 1279 .....6, 7

Miscellaneous

Revenue Ruling 69-421(j)(1) 5

Revenue Ruling 69-421(j)(2) 6

Revenue Ruling 69-421(j)(3) 5

Statutes

Labor Management Relations Act of 1947, Sec. 2 (3), (29 U.S.C. Sec. 152(3)) 8, 9

Labor Management Relations Act of 1947, Sec. 8 (a)(5) 9

Page

Labor Management Relations Act of 1947, Sec. 302 6

Labor Management Relations Act of 1947, Sec. 302(c)(5), (29 U.S.C. §186(c)(5)) .....4, 5, 7 .....8, 9, 10, 11

Labor Management Relations Act of 1947, 29 U.S.C. Secs. 151-168 4

Labor Management Relations Act of 1947, 29 U.S.C. Sec. 152(3) 4

Labor Management Relations Act of 1947, 29 U.S.C. Sec. 186 2

United States Code, Title 28, Sec. 1254(1) 2

Textbooks

2 U.S. Code Congressional and Administrative News (86th Cong. 1959), p. 2469 7

1 Witkin, Summary of California Law, Sec. 22, p. 658 10

IN THE

Supreme Court of the United States

October Term, 1978
No. .....

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, HAROLD BRAUER, respectfully prays that a Writ of Certiorari issue to review the decision and opinion of the Court of Appeal of the State of California, Second Appellate District, entered on June 27, 1978.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, was certified for publication and is cited as 2nd Civil No. 52726; Superior Court No. C 92128.

Jurisdiction.

Petitioner petitioned for a rehearing in the Court of Appeal which was denied on July 19, 1978 and his Petition for Hearing in the Supreme Court was de-

nied on August 24, 1978. Jurisdiction is invoked under 28 U.S.C. §1254(1). Jurisdiction is further invoked by the fact that there is a conflict between a decision of the United States Court of Appeals for the Seventh Circuit and the Court of Appeal of the State of California, Second Appellate District, regarding the interpretation of 29 U.S.C. Section 186.

Petitioner dismisses Local 108 of Sheet Metal Workers International Association, C. Ringwood; R. Pic'l; R. Mosula from this petition.

Question Presented.

Whether the Labor Management Relations Act of 1947, 29 U.S.C. Section 186, precludes a Fifty Percent (50%) shareholder of a small, closely held corporation from participating in a pension established under this section.

Statement of the Case.

From 1948 until July of 1973, Petitioner was a dues-paying member in good standing of Local 108 of the Sheet Metal Workers International Association (hereinafter referred to as "LOCAL 108"). From 1951 to 1957, Petitioner was a partner in the business firm of Crenshaw Sheet Metal and Heating Company with one other individual, Irv Rudley. In 1957, Petitioner and his partner formed a corporation titled Crenshaw Sheet Metal & Heating, Inc. (hereinafter referred to as "CRENSHAW"). In 1965, Petitioner acquired Fifty Percent (50%) of Crenshaw and became Vice-President. (App. D., p. 2.) In 1958, a pension plan was

created and pursuant to the collective bargaining agreement, Crenshaw became a participant. (App. D., p. 2.) From 1957 to 1973, Petitioner remained a dues-paying member of Local 108. In 1973, Petitioner received a letter advising him that he had 25 years of vested pension credits which would entitle Petitioner to $500.00/per month, for the rest of his life. (App. D., p. 3.)

Subsequently, Petitioner was notified by Sheet Metal Workers Pension Plan of Southern California (hereinafter referred to as "PENSION PLAN"), that he could not participate in the pension plan because he was a co-owner of Crenshaw.

Additionally, Local 108 requires that as a condition of continued employment, all "employees . . . within eight (8) days following the beginning of such employment, become a member of Local 108". Thus, by virtue of the Local 108 Constitution, Petitioner was required to be a Union member, and was so for 25 years.

Lastly, the term "employee", as defined in the pension plan, provides for inclusion of said employees if not in violation of existing law or regulation.

The Court of Appeal denied Petitioner his pension on the sole ground that he was an employer because he owned Fifty Percent (50%) of Crenshaw, a small, closely held corporation.

REASONS FOR GRANTING THE WRIT.

THE COURT OF APPEAL'S HOLDING THAT PETITIONER WAS AN EMPLOYER FOR PURPOSES OF SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 29 U.S.C. §186(c)(5) IS ERRONEOUS AND CONTRARY TO PRINCIPLES ENUNCIATED IN THE DECISIONS OF THIS COURT AS WELL AS RECENT APPELLATE RULINGS DECIDED AFTER PETITIONER'S CASE WAS HEARD. THE ISSUE OF WHETHER OR NOT A FIFTY PERCENT (50%) SHAREHOLDER OF A SMALL, CLOSELY HELD CORPORATION IS AN EMPLOYER OR EMPLOYEE IS OF SUBSTANTIAL IMPORTANCE BECAUSE THERE ARE MANY TAFT-HARTLEY PLANS, QUITE A NUMBER OF WHICH ALLOW PARTICIPATION BY PERSONS SUCH AS PETITIONER.

I

The Holding by the California Court of Appeal Is in Conflict With the Recent Decisions of the Other Appellate Courts.

Prior to the Court of Appeal's ruling, there has been no Court, State, Federal or otherwise, that has held that a Fifty Percent (50%) shareholder of a corporation cannot participate in a Taft-Hartley Trust Fund.

29 U.S.C. Section 152(3) defining the term employee was erroneously applied by the Court of Appeal to 29 U.S.C. Section 186(c)(5). All the N.L.R.B. cases cited by the parties and the Court below relate to the use of the term "employee" as it is used in Subchapter II, Chapter 7, Title 29 (29 U.S.C. §§151-168). These sections relate to the collective bargaining process, not to the administration of trust funds. In particular, the Court of Appeal relied in their opinion

on the case of *Cerni Motor Sales, Inc.* (1973) 201 N.L.R.B. 918, which concerned the issue of who would be an employee for purposes of collective bargaining purposes.

On August 11, 1978, the United States Court of Appeals, for the Seventh Circuit, rendered a decision in the case of *James J. Reiherzer v. Daniel J. Shannon, and Central States, Southeast and Southwest Areas Pension Fund,* No. 77-1911 which encompasses the identical issues, and this holding is completely opposite to the California Court of Appeal's decision involving Petitioner.

In the *Reiherzer* case, the Court found that *Reiherzer,* who was a Ninety Percent (90%) shareholder in a corporation, could participate in a Taft-Hartley Trust Fund. The Court held that Defendant's contention that they would be in violation of the L.M.R.A. Section 302(c)(5) because of the definition of the term "employee" found in the act which states:

> "The term employee shall include any employee . . . but shall not include any individual employee as a supervisor."

was completely without merit. Thus, this decision is completely opposite to the ruling by Second Appellate District of the Court of Appeal in the State of California and, therefore, certiorari should be granted to resolve this conflict.

Furthermore, the Court, in *Reiherzer,* found that Revenue Ruling 69-421(j)(3) permits shareholders who are bona fide employees of a corporation to participate in the corporation's plan to the same extent as other employees. The Court further states that Revenue Ruling 69-421(j)(1) may exclude sole proprietors and partners from participating in a qualified plan and

does not exclude corporate officers who may be employees of a valid corporation from participating in a qualified plan. Since the trust fund was established after Petitioner was an owner of Fifty Percent (50%) of the corporate stock and an officer of the corporation, then Revenue Ruling 69-421(j)(2) does not preclude Petitioner from participating in the trust fund.

In the recent case of *Sanchez v. Trustees of Pension Plan*, 359 So.2d 1279, decided June 19, 1978 in the Louisiana Supreme Court, the Court held that two individuals, who had paid Union dues for many years and all other sums required of Union members and who contributed to Union pension, health and welfare plans pursuant to prevailing collective bargaining contracts, are employees within the meaning of their plans, even though the Court found that these two individuals were top officers, in covered corporations in which each holds at least Fifty Percent (50%) of the stock. The Court noted that officers and supervisory employees are not excluded by Section 302 of the L.M.R.A. from participation in contractually-established employee benefit trust funds. The Court noted that the right of participation depends upon the specific language of the trust instruments themselves. In *Sanchez*, the Court cited the trust language which says that trust funds provide that benefits may be received by "any employee of a contributing employer covered by a collective bargaining contract and by such other employees whom the trustees shall determine to be employees."

In the present case, the trust fund says that covered employment under the plan means "any employee of an individual employer who performs one or more hours of work covered by any of the collective bargaining agreements." Thus, this provision is almost

identical to the provision in the *Sanchez* case and thus, because of the similarity between the two, and the opposite opinions reached by two different Courts, it is this Petitioner's contention that because of the conflicts among the Courts, that this Court grant a writ of certiorari to establish uniformity in the decisions of the Courts across the nation.

II

The California Court of Appeal Failed to Consider the Purpose of Section 302(c)(5) Which Calls for the Inclusion of Petitioner in These Pension Plans.

The Court of Appeal erred in failing to consider the purpose for which Section 302(c)(5) of the Labor Management Relations Act was enacted. A review of the purpose of this Section was important because of the trustees' reliance on the language of the trust agreement which provides for inclusion as long as not in violation of any existing law or regulation. The legislative history of the statute simply states:

> "The purpose of these amendments to Section 302 is to forbid any payment, loan or bribe by any employer, employer association, or anyone acting on an employer's behalf . . ." 2 U.S. Code Cong. and Admin. News 2469 (86th Cong. 1959).

Justice Blackman explained the Court's general approach to interpreting Section 302(c)(5):

> "We would approach our present task with a construction policy, *favoring inclusion and benefits where there is no positive statutory language or inference of exclusion*, rather than one favoring exclusion and a denial of benefits where there

is no positive language of inclusion." (Emphasis added). *Blassie v. Kroger Company,* 345 F.2d 58, 68 (8th Cir. 1965).

Thus, the Courts have favored inclusion where there is no statutory language or inference of exclusion.

III

The California Court of Appeal's Reliance on Cerni vs. Ford Motor Company Is Totally Erroneous.

Additionally, the Court of Appeal failed to look at the specific language in the Petitioner's pension plan and relied solely on case law that decided who was an employee for purpose of collective bargaining, only. In particular, the Court of Appeals erroneously relied on *Cerni Motor Sales, Inc. v. Ford Motors* (1973) 201 N.L.R.B. 918. The Court of Appeal stated that "where an individual owns 50% or more of a closely held corporation, as in the case of a co-partner, that individual is, for purpose of Section 152(3), the actual employer of the employees." (App. D., p. 9.)

The reliance on this case is totally erroneous because this was decided in a collective bargaining context, *i.e.,* who would be an employee for collective bargaining purposes only, not who would be eligible for pension established under 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. 186.

Furthermore, in the case of *N.L.R.B. v. Caravelle W.D. Prod., Inc.,* 466 So.2d 675 (7th Circuit, 1972), the Court held that:

> "The N.L.R.B. had acted arbitrarily in excluding a relative of a controlling shareholder/officer of a corporation from being considered an employee of the corporation pursuant to the Labor Management Relations Act Section 2(3), 29 U.S.C. Section 152(3) which provides 'the term "employee" shall include any employee . . . but shall not include . . . any individual employed by his parent or spouse.' "

Thus, the relative had to be considered an "employee" of the corporation unless the business was, in fact, a sole proprietorship. The Court was stating that the shareholder/officer was not the employer of his or her relative.

Thus, the Petitioner herein could not be considered an employer because he was a shareholder and/or officer of a small, closely held corporation. Of utmost importance is the fact that *Caravelle* was decided prior to *Cerni* and the *Cerni* case failed to distinguish the *Caravelle* case. Thus, the 7th Circuit has rejected the rationale for *Cerni* in the *Caravelle* case cited above.

In the case of *Allied Chemical and Alkali Workers of America v. Pittsburg Plate Glass Co.,* 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383, the Court held that

> "contrary to the Board's assertion, the Union's role in administration of the funds is of a far different order from its duties as collective-bargaining agent. To accept the Board's reasoning that the Union's §302 (c)(5) responsibilities dictate the scope of the §8(a)(5) collective bargaining obligation would be to allow the tail to wag the dog."

What the Court was saying is that there are completely different standards in determining who can participate in a collective bargaining agreement as compared to who can participate in a pension plan established thereunder.

IV

The Trustees' Decision Was Arbitrary and Capricious Because Their Decision Was Based on an Erroneous Interpretation of Case Law.

The Court of Appeal's decision can also be reversed on the grounds that the trustees' decision was arbitrary and capricious.

Where the trustees' decision is erroneous on a question of law, it should be reversed. In the present case, it was stipulated that Petitioner was a Fifty Percent (50%) owner of a small, closely held corporation, and thus, where the facts are stipulated, it becomes a question of law. (1 Witkin, Summary of California Law, "Agency and Employment" Sec. 22, page 658.) In *Rehmar v. Smith* (C.A. 9th, 1976) 55 F.2d 1362, the Court held at page 1371:

> "Those decisions may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or *erroneous on a question of law*." (Emphasis added.)

To the extent that the trustees "interpret" the provision by adding an unwritten proviso that Fifty Percent (50%) or greater shareholders are not employees, is itself a violation of 186(c)(5). This Section also requires that the requirements be "in writing" and the proviso regarding stockholders certainly is not in writing. *Cuff v. Gleason* (E.D. N.Y. 1974) 382 F. Supp. 1144, 1146, Rev'd on other grounds, 515 F.2d 128.

V

Public Policy Dictates That Petitioner Be Granted His Pension Pursuant to Section 302(c)(5) of the Labor Management Relations Act.

Public policy dictates that Petitioner be granted his pension pursuant to Section 302(c)(5) of the Labor Management Relations Act.

First, the Petitioner was a corporate officer in a small, closely held corporation and, thus, is much closer to an employee than would be a corporate officer in a rather large corporation such as Ford Motor Company. Big corporations do not want to be in the plans established for the benefit of Petitioner because they can make more money under their own internal pension plans than would be available for them under the pension plans created pursuant to collective bargaining agreements by a Union.

Secondly, if we do not allow people such as Petitioner to participate in these Taft-Hartley pension funds, these individuals will lose their right to accumulate pension credits because their pension credits will not be transferable from one company to another because of their ownership of a percentage of corporate stock. In other words, this would prohibit people such as Petitioner from leaving a particular company and taking their pension rights with them. Thus, a great detriment will occur to people such as Petitioner by the inability to accumulate pension credit and transferability thereof from job to job.

Thirdly, by not allowing Petitioner to become a participant in a Taft-Hartley pension fund, creates a problem of diversification of assets established in a pension for Petitioner. If Petitioner were part of a larger trust fund, then the assets could be diversified among varying assets, securing the amount contributed to the pension by the greater ability of diversification.

Fourthly and lastly, many plans across the nation allow workers such as Petitioner to participate in these pension plans set up under the Taft-Hartley Act. It is extremely important that this Court grant the Writ of Certiorari because the plans which allow for the participation of people such as Petitioner are now placed in a very unstable position.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Dated: November 15, 1978.

Respectfully submitted,

LAW OFFICES OF ROBERT S. MICHAELS,
ROBERT S. MICHAELS,
Counsel for Petitioner
Harold Brauer.

MARC J. BRAUER,
Of Counsel.

APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Harold Brauer, Plaintiff and Appellant, vs. Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada; Local 108 of Sheet Metal Workers International Association; C. Ringwood, Defendants and Respondents. 2d Civ. No. 52726, (Sup. Ct. No. C-92128).

Filed: June 27, 1978.

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven S. Weisman, Judge. Affirmed.

Marc Jay Brauer, Michaels and Sobel, for Plaintiff and Appellant.

Robert W. Gilbert; Pesses, Golden and Chapman, By: William S. H. Chapman; for Defendants and Respondents.

At the time of this appeal, appellant was and had been since 1948 a member of Sheet Metal Workers International Association, Local 108 (Local 108), one of the respondents herein. In 1951, appellant became a partner in the business firm of Crenshaw Sheet Metal and Heating Company (Crenshaw). In 1958, the Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada (the Pension Plan), also a respondent, came into existence. The Pension Plan concededly is one governed by the provisions of the Labor Management Relations Act of 1947 as amended (the Act)[1] in section 302 thereof (29 U.S.C. § 186).

[1]U.S.C. § 151 et seq. All code section references hereinafter are to the United States Code, Title 29.

At about the same time, Crenshaw was incorporated as Crenshaw Sheet Metal and Heating, Inc. (Crenshaw Inc.) though appellant did not then become a shareholder of the company. In 1965, appellant acquired as registered owner 50 percent of the outstanding stock of Crenshaw Inc. and presently continues to own one-half of that business. Throughout his involvement with Crenshaw and Crenshaw, Inc., appellant contributed to success of the business by his efforts in the field as a sheet metal worker and occupied the managerial position of Vice President of Crenshaw Inc. for the most part in name only. From its inception, Crenshaw Inc. made contributions to the Pension Plan for appellant's benefit; at no time did appellant or Crenshaw Inc. disclose to the Pension Plan appellant's 50 percent stock ownership.

On July 11, 1973, the Pension Plan notified appellant by letter he had acquired a vested pension benefit whereby he was entitled to receive the sum of $500 monthly at retirement. Upon discovery of appellant's ownership interest in Crenshaw Inc. and on September 25, 1973, the Pension Plan advised appellant he was ineligible for the pension benefit and thereafter, on November 25, 1973, tendered its refund of contributions made in his behalf in the amount of approximately $8400. The tender was not accepted and appellant on June 21, 1974, brought the within action for declaratory relief, breach of contract and deceit. Following special demurrers sustained and respondents' answers to appellant's first amended complaint, the matter was set for trial on October 18, 1976, at which time the trial court granted respondents' motion for judgment on the pleadings. A subsequent motion for reconsideration and for leave to file a second amended complaint

was considered by the trial court and on April 18, 1977, in the judgment appealed from was denied.[2]

In substance, the trial court found: (a) appellant's eligibility for benefits from the Pension Plan was determinable from the provisions of section 186(c)(5)[3] as interpreted by federal law; (b) under the Act, any payments by or on behalf of an employer to the Pension Plan for the benefit of such employer are illegal, violative of criminal sanctions contained in the Act and cannot provide a basis for any claim of estoppel which would require awarding a pension to such employer; (c) under the circumstances present

---

[2]The judgment contains in recital form the statement that "having granted Plaintiff leave to file a Second Amended Complaint, which does not materially differ from Plaintiff's First Amended Complaint, the Court finds as follows: * * *." No second amended complaint was filed except as a proposal made part of the motion to reconsider and it is sufficiently clear the judgment did not intend to provide permission for its filing, since the motion for judgment on the pleadings in fact was granted and the motion for reconsideration denied.

[3]Section 186 provides in pertinent part:

"§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(This footnote is continued on next page)

and in accordance with prior decisions of the National Labor Relations Board (the NLRB), recognized by the United States Supreme Court as definitive in any instance where made within the NLRB's authority, appellant was not an employee as required by the Act; and therefore, (d) no cause of action had been or could validly be asserted by appellant.

We concur in the trial court's reasoning and in the result reached. In our view, the matter turns upon the questions whether one is an employee so as to satisfy the Act's requirements and whether that determination is solely ascertained by reference to federal

(3) to any employee or group or committee of employees of such employers employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employee or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(c) The provisions of this section shall not be applicable

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer,* and their families and dependents

* * *

(d) *Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.* [Emphasis added]"

rather than state law.[4] The latter question is answered clearly in the affirmative. (See *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482; *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933.)

> "By its terms, section 301 of the Labor Relations Act permits suit for violation of a collective bargaining agreement to be brought in federal court. * * * However, in enacting section 301(a), Congress promulgated more than a mere jurisdictional statute; it authorized the federal courts to create a body of federal law for the enforcement of collective bargaining agreements within the ambit of congressional power. (*Textile Workers Union v. Lincoln Mills* (1957) 353 U.S. 448, 456-457 [1 L.Ed.2d 972, 980-981, 77 S.Ct. 912].) In accord with the holding of *Lincoln Mills,* the California Supreme Court has declared that when state courts exercise concurrent jurisdiction with federal courts, they must, in adjudicating an action which could have been brought in the federal courts under section 301, apply federal substantive law. (*Butchers' Union Local 229 v. Cudahy Packing Co.* (1967) 66 Cal.2d 925, 930-931 [59 Cal.Rptr. 713, 428 P.2d 849]; *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 486 [30 Cal.Rptr. 452, 381 P.2d 188].)" (*Lehto, supra,* 942-43.)

[4]An additional question relating to jurisdiction of the trial court is raised by respondent Local 108. In brief terms, it concerns whether appellant could state a cause of action commenced under section 186(c)(5) in view of the contents of section 186(e) thereof (see *Mobile Mechanical Contractors Assn. v. Carleugh* (1977) 566 F.2d 1213) or under section 185, to enforce the terms of a collective bargaining agreement. While ordinarily such an issue would be viewed as a threshold matter, we do not so address it, since under the circumstances here involved, the question essentially would be disposed of upon the rationale we adopt in our opinion.

That being the case, it is likewise clear appellant in no wise was an employee for purposes of the Act and accordingly could not enjoy the benefits claimed. So far as section 186 is concerned, the definition of employee is that found in section 152(3), viz:

> "The term employee shall include any employee, and shall not be limited to employees of a particular employer, unless this sub-chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment, shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

While it is not true that the NLRB is immunized from judicial review in providing parameters within which definitions are to be correctly understood, it is the case that:

> "* * * the task of determining the contours of the term 'employee' 'has been assigned primarily to the agency created by Congress to administer the Act.' NLRB v. Hearst Publications, 322 US 111, 130, 88 L Ed 1170, 1184, 64 S Ct 851 (1944). See also Iron Workers v. Perko, 373 US 701, 706, 10 L Ed 2d 646, 649, 83 S Ct 1429 (1963); NLRB v Atkins & Co. 331 US 398, 91 L Ed 1563, 67 S Ct 1265 (1947)."

and that:

> "[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."
> (*Allied Chemical & Alkali Workers v. P.P.G. Co.* (1971) 404 U.S. 157, 166; see also *Associated Gen. Contractors, Etc. v. N.L.R.B.* (1977) 564 F.2d 271.)

In turn the NLRB has determined: "Where an individual owns 50 percent or more of a closely held corporation, as in the case of a co-partner, that individual is, for the purpose of Section 152(3), the actual employer of the employees." (*Cerni Motor Sales, Inc.* (1973) 201 NLRB 918. See also *Toyota Midtown, Inc.* (1977) 233 NLRB 106; *Foam Rubber City No. 2 of Florida* (1967) 167 NLRB 623.) Accordingly, appellant was not an employee within the scope of section 186 and was not properly a recipient of any pension benefit thereunder.

Nor is this result altered by considerations of estoppel since the constraints of section 186 are criminal in nature and "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust. Rittenberry v. Lewis, 238 F.Supp. 506 (E.D.Tenn. 1965); Bolgar v. Lewis, 238 F.Supp. 595 (W.D.Pa. 1960)." (*Moglia v. Geoghegan* (1968) 403 F.2d 110, 116.)

Finally, as set out in the Agreement and Declaration of Trust Establishing Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada, dated August 11, 1972, the powers of the Pension Plans' trustees includes the power "To construe the provisions of this Trust Agreement and the Pension Plan and any such construction adopted by the Board in good faith shall be binding upon any and all parties or persons affected thereby."

Here, the trustees determined appellant was not eligible for benefits based upon their acceptance of the definition of the term employee as outlined above. Under such circumstances, where there is no showing nor any sufficient allegations in the complaint that the trustees acted arbitrarily, capriciously or in bad faith, their actions are final and not subject to judicial review. (*French v. Construction Laborers Pension Trust* (1975) 44 Cal.App.3d 479; *Park v. Board of Trustees* (1971) 21 Cal.App.3d 630.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

ROTH, *P.J.*

We concur:

FLEMING, *J.*
COMPTON, *J.*

Modification of Opinion.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Harold Brauer, Plaintiff and Appellant, vs. Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada; Local 108 of Sheet Metal Workers International Association; C. Ringwood, Defendants and Respondents. 2d Civ. No. 52726, (Sup. Ct. No. C-92128).

Filed: July 11, 1978.

THE COURT:

It is hereby ordered that the opinion filed herein on June 27, 1978 be, and it is hereby modified and corrected as follows:

The last two lines on page 1 thereof are stricken and the following is substituted in lieu thereof:

"Robert W. Gilbert, A Law Corporation, By: James B. Goodman for Defendant and Respondent Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada;

"Pesses, Golden and Chapman, By: William S. H. Chapman for Defendant and Respondent Local 108 of Sheet Metal Workers International Association and Clyde Ringwood."

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1978.

_____

_____

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-824

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Law Offices of ROBERT W. GILBERT,
A Law Corporation,
400 South Beverly Drive, Suite 305,
Beverly Hills, Calif. 90212,
(213) 552-1300,
ROBERT W. GILBERT,
Counsel for Respondents Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada.

JAMES B. GOODMAN,
KENNETH J. SACKMAN,
ROBERT W. GILBERT, a Law Corporation,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
A. Factual Background	2
B. Procedural Background	3
Reasons for Denying the Writ	6
1. Section 302(c)(5) Prohibits an Employer From Participating in a Taft-Hartley Pension Plan	6
2. The Determination by the Trustees That a 50% Shareholder Is an Employer, Is Reasonable and Not Arbitrary and Capricious	12
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases — Page

Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 10

Alvares v. Erickson, 514 F.2d 156 (9th Cir. 1975) 11

Bargreen v. Western Conference of Teamsters Pension Trust (W.D. Wash. 1976) 91 LRRM 2803 .. 9

Beam v. Masters, Mates & Pilots, 511 F.2d 975 (2nd Cir. 1975) 12

Cerni Motor Sales, Incorporated and District 79, International Association of Machinists and Aerospace Workers, 201 NLRB 133 8

Dohrer v. Wakeman, 14 Wash.App. 157, 539 P.2d 91 9

Foam Rubber City No. 2 of Florida, reported at 167 NLRB 623 8

Foley v. Devaney, 528 F.2d 888 (3rd Cir. 1976) .. 12

French v. Construction Laborers Pension Trust, 44 Cal.App.3d 479, 118 Cal.Rptr. 731 (1975) 12

Gomez v. Lewis, 414 F.2d 1312 (3rd Cir. 1969) 12, 13

Knoll v. Phoenix Steel, 465 F.2d 1128 (3rd Cir. 1972) 10

Melang v. IBEW Pacific Coast Pension Fund (W.D. Wash. 1976) 93 LRRM 2389 9

Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967) .. 12

Moglia v. Geoghagen, 267 F.Supp. 641, 647 (S.D.N.Y. 1967) aff'd 403 F.2d 110 (2nd Cir. 1968) cert. denied 394 U.S. 919 (1969) 8, 9, 10, 11

Page

Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978) 13

Roark v. Lewis, 401 F.2d 425 (D.C. Cir. 1968) 14

Sanchez v. Board of Trustees, 359 So.2d 1279 (La. Supr.Ct. 1978) 13

Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 9

Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) 10

Toyota Midtown, 223 NLRB No. 106 8

United States v. Ryan, 350 U.S. 299 11

Wilson v. Board of Trustees, 564 F.2d 1299 (9th Cir. 1978) 12, 14

Miscellaneous

Legislative History of the Labor Management Relations Act, (United States Government Printing Office, 1948) pp. 458, 571 and 304 11

Statutes

Labor Management Relations Act of 1947, Sec. 302 (29 U.S.C. § 186) 1, 6, 7, 12, 13, 14

Labor Management Relations Act of 1947, Sec. 302(c)(5) (29 U.S.C. § 186(c)(5)) 2, 6, 10, 11, 13

Labor Management Relations Act of 1947, Sec. 501 (29 U.S.C. § 142) 7, 10

Labor Management Relations Act of 1947, Sec. 501(3) 10

Page

National Labor Relations Act, 29 U.S.C. Sec. 152 7

National Labor Relations Act, 29 U.S.C. Sec. 152 (3) 7

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 28, Sec. 1257(3) 1

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-824

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District is reported at 82 Cal.App.2d 150.

Jurisdiction.

Petition incorrectly invokes jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction may be appropriate under 28 U.S.C. § 1257(3).

Questions Presented.

The two questions presented in this case are as follows:

1) Whether under Section 302 of the Labor Management Relations Act, 1947 (29 U.S.C. § 186), a Fifty Percent (50%) shareholder of a corporation is

an "employer" rather than an "employee" and is thereby precluded from receiving benefits from a pension trust established under that Section.

2) Whether the determination by the Board of Trustees that a 50% stockholder is an employer and not an employee is arbitrary and capricious, or conversely, is that determination reasonable.

Statement of the Case.

A. Factual Background.

Petitioner is and has been a sheet metal worker since approximately 1948. From 1948 on Petitioner has also been a member of Sheet Metal Workers International Association Local 108. (C.T. p. 4.)[1] In 1951 Petitioner became a partner in Crenshaw Sheet Metal and Heating Company. (C.T. pp. 37-527). In 1958 the Pension Plan was adopted pursuant to a collective bargaining agreement and Section 302(c)(5), (29 U.S.C. § 186(c)(5)).

In 1958 Irving Rudley became the owner of 750 shares of stock in the corporation then known as Crenshaw Sheet Metal and Heating, Inc. (C.T. p. 323.) Apparently, Harold Brauer continued to work for Crenshaw Sheet Metal as a sheet metal worker from 1951 through at least 1965. On June 7, 1965, Brauer became the registered owner of 750 shares of stock which were issued to him at that time. (C.T. pp. 324, 131 and 527.) Brauer alleges, and it is not disputed by Respondents, that he continued to work for the corporation as a sheet metal worker, and it is similarly undisputed that contributions continued to be made on his behalf to the Pension Fund. (C.T. p. 474.)

[1]References to the Clerk's Transcript are abbreviated "C.T.".

By letter dated March 26, 1973, Respondent Pension Plan advised all employers including Harold Brauer that they could not accept contributions on behalf of any employers, in light of the statutory prohibition contained in the Taft-Hartley Act. That letter indicated that an "employer" was any person owning 50% or more of the stock of a corporation. (C.T. p. 588.)

Notwithstanding the letter of March 26, 1973, Plaintiff continued to make contributions on his own behalf into the fund and failed to notify the Trustees of his 50% ownership interest in Crenshaw Sheet Metal.

On July 11, 1973, Respondent Plan advised him in response to an inquiry by Plaintiff that he would be entitled to a $500.00 per month pension based upon 25 years of Pension Credit. At that time the Trustees had no knowledge of Brauer's ownership interest. Thereafter, after further investigation by the Plan, in a letter dated September 25, 1973, Respondent advised Petitioner that since he was, and had been, an employer he would be ineligible for a pension benefit. (C.T. p. 470.) On November 25, 1973 Defendant Plan tendered a refund to Petitioner of the contributions made on his behalf during the period of time that he was an owner of the business. (C.T. pp. 473-465.)

B. Procedural Background.

On June 21, 1974, the Petitioner brought the instant action in the Los Angeles Superior Court for declaratory relief, breach of contract and deceit. (C.T. p. 1.)

Subsequently, Petitioner filed a first amended complaint on October 28, 1974. (C.T. p. 45.) Said complaint set forth nine causes of action against the Pension

Plan, Local 108 and various Local Union officers for declaratory relief, breach of oral and written contracts and deceit.

Following all Respondents' answers to the first amended complaint, the matter was set for trial. After the opening of said trial and before any testimony was given, the court granted Respondents' motion for judgment on the pleadings. This ruling was based upon the fact that Petitioner admittedly had been a partner and then a 50% shareholder of stock in the corporation of Crenshaw Sheet Metal and Heating, Inc., and as a result thereof, under applicable Federal Law, Petitioner was an employer. The court ruled that Federal Law provides that a Taft-Hartley trust fund may only provide benefits for the "sole and exclusive benefit of employees," and since Petitioner is not an employee within the meaning of the National Labor Relations Act as amended, that, therefore, Petitioner was, as a matter of law, ineligible to participate in this pension fund.

On April 18, 1977, the court signed the judgment (C.T. p. 888), and on April 19, 1977, notice of entry of judgment was filed. Petitioner filed its notice of appeal on June 15, 1977, specifically appealing from the entire judgment on the pleadings entered on April 18, 1977. (C.T. p. 895.)

In his Petition to this Court, Petitioner has abandoned his claim against the union and the individuals and his various causes of action for breach of contract and deceit. He also appears to admit that he is not

entitled to Pension Credit for the period in which he was a partner in Crenshaw Sheet Metal, in that he admittedly was an employer during that period. Petitioner has limited his Petition to the propriety of the Trustees' determination that a 50% shareholder is an employer for purposes of Section 302 and therefore is ineligible for pension benefits from a Trust established pursuant to that Section.

REASONS FOR DENYING THE WRIT.

1. Section 302(c)(5) Prohibits an Employer From Participating in a Taft-Hartley Pension Plan.

Section 302 generally provides restrictions on payments and loans by employers or employer associations to labor organizations, officers or employees thereof, and employees of the employer subject to certain enumerated exceptions. That Section provides criminal penalties for violations.[2]

The exception applicable to pension plans is contained in subsection (c)(5) which provides that the provisions [criminal penalties] of the Section shall not be applicable

> "with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer,* and their family and dependents . . . ."

That exception is subject to certain provisos such as the requirement that the money be held in trust and administered by "*employees and employers . . . equally represented in the administration of such fund*", that the provisions of the Trust be set forth on a detailed basis in writing, that procedures be established to break deadlocks between the employees and employers in the administration of the Trust, that annual audits be conducted, etc.

Petitioner does not dispute the fact that if he, indeed, is an employer, that he is not and cannot be eligible for Pension Credit or pension benefits based on the period in which he was a employer. The sole dispute

[2]The full text of Section 302 is set forth in the Appendix.

is over the Trustees' interpretation of the term "employer".

In seeking statutory guidance as to the intent of Congress to determine whether the Plaintiff is an employee or an employer for purposes of Section 302, we must note that Section 501 of the Act, 29 U.S.C. § 142, provides that the definition of employee for purposes of Section 302, shall be the same as the definition set forth in the National Labor Relations Act, at 29 U.S.C. § 152(3).

That Section provides:

> "The term employee shall include any employee, and shall not be limited to employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment, shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by an employer subject to the Railway Act, as amended from time to time, or by any other person who is not an employer as herein defined."

In interpreting 29 U.S.C. § 152, the National Labor Relations Board has consistently held that the definition of the term "employee" excludes sole proprietors and partners. There is no dispute as to that fact in the instant matter.

Further, the National Labor Relations Board has ruled that a 50% shareholder is in substantially the equivalent position as an individual who is a partner or a sole proprietor of that business, and therefore, not an employee. Thus, even though the state laws, with respect to closely-held corporations, provide different rights and obligations for 50% shareholders of corporations than they would for a partnership or a sole proprietorship, *for purposes of collective bargaining,* the Board has recognized that a 50% shareholder stands in the same position vis-a-vis his employees and the collective bargaining relationship, as would a partner or sole proprietor.

Thus, the National Labor Relations Board, in the case of *Cerni Motor Sales, Incorporated and District 79, International Association of Machinists and Aerospace Workers,* 201 NLRB 133, found that a 50% shareholder would be deemed to be an employer. In that specific case, in fact, the child of the 50% shareholder was similarly excluded from the definition of "employee" inasmuch as the shareholder was deemed to be the employer for all purposes. In *Cerni Motors,* the Board was reviewing and reaffirming its decision in *Foam Rubber City No. 2 of Florida,* reported at 167 NLRB 623. (See also *Toyota Midtown,* 223 NLRB No. 106.)

Thus, it is clear that where an individual owns 50% or more of a closely-held corporation, that individual is an employer for purposes of the definition section of the National Labor Relations Act.

Thus, the United States Court of Appeals, for the Second Circuit, found in the lead case of *Moglia v. Geoghagen,* 403 F.2d 110 (2nd Cir. 1968) that payments to a trust fund may only be made where the

contributions are destined for "the sole and exclusive benefit of the employees of such employer."

In interpreting *Moglia,* courts have routinely found that an individual such as Petitioner herein, who is the employer of his employees, is not eligible to participate in such a plan. See e.g., *Thurber v. Western Conference of Teamsters Pension Plan,* 542 F.2d 1106; *Dohrer v. Wakemen,* 14 Wash.App. 157, 539 P.2d 91; *Melang v. IBEW Pacific Coast Pension Fund,* (W.D. Wash. 1976) 93 LRRM 2389; *Bargreen v. Western Conference of Teamsters Pension Trust,* (W.D. Wash. 1976) 91 LRRM 2803.

As the court stated in *Moglia*:

> "[o]nly employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust. *Rittenbury v. Lewis,* 238 F.Supp. 506 (E.D. Tenn. 1965); *Bolgar v. Lewis,* 238 F.Supp. 595 (W.D. Pa. 1960)."

As the court went on to explain:

> "The reason for the rigid structure of Section 302 is to ensure that employer contributions are only for a proper purpose and to ensure that the benefits from the established fund reach only the proper parties. *Schwartz v. Associated Musicians of Greater New York, Local 802,* 340 F.2d 228, 233-234 (2nd Cir. 1964). Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted. See *Arroyo v. United States,* 359 U.S. 419, 423-427; Cf. *Inter-*

national Longshoremen's Association v. Seatrains Lines, Inc., 403 F.2d 110, 116."

The only conceivable question left for this Court to determine is whether a 50% shareholder who, for purposes of the National Labor Relations Act, shall be treated as the employer of his employees must also be so treated for purposes of Section 302(c)(5) pension plans. While the answer to this question has never been specifically stated in any reported cases, Section 501 clearly states that courts are to follow the definitions of "employee" and "employer" as contained in the National Labor Relations Act.

Plaintiff attempts to argue, nevertheless, that the definitions contained in the National Labor Relations Act are not necessarily binding in Section 302 cases, notwithstanding Section 501. He bases his argument on the decision of this Court in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass,* 404 U.S. 157. That case, however, as Plaintiff, himself, points out, does not involve the applicability of NLRA definitions, but involved the duties and responsibilities of a union in collective bargaining vis-a-vis its role in the joint management of a Section 302 trust fund. It is obvious that the fiduciary duties towards the beneficiaries involved in such management is different and distinct from the duties of the union involved in collective bargaining. (See *e.g., Toensing v. Brown,* 528 F.2d 69 (9th Cir. 1975); *Knoll v. Phoenix Steel,* 465 F.2d 1128 (3rd Cir. 1972)).

Plaintiff conveniently ignores another case decided by this Court which expressly accepts the mandate of Section 501(3) that the terms enumerated in that section (including that of the employer) shall have

the same meaning for purposes of the Labor Management Relations Act as they do for the National Labor Relations Act. *United States v. Ryan,* 350 U.S. 299, 301. Thus Plaintiff's argument has already been rejected by this Court.

Plaintiff's argument further ignores the recognition by Congress as expressed in the Labor Management Relations Act that employers and employees have very different interests not only in the collective bargaining process, but also in regards to the management of pension trust funds. The establishment of joint control over trust funds based upon equal representation between labor and management on the board of trustees is based upon that principle [See *Legislative History of the Labor Management Relations Act,* (United States Government Printing Office, 1948) pp. 458, 571 and 304 and *Moglia v. Geoghagen,* 267 F.Supp. 641, 647 (S.D.N.Y. 1967) aff'd 403 F.2d 110 (2nd Cir. 1968) cert. denied 394 U.S. 919 (1969).

It would be anomalous, indeed, if after providing restrictions on payments by employers to employees or their representatives that Congress would provide an interesting loophole by allowing the employers and the employees or their representatives to be *the same person.* The possibility of corruption and abuse which was to be prevented by the requirements of Section 302(c)(5), (*Alvares v. Erickson,* 514 F.2d 156, 164 (9th Cir. 1975) would obviously be increased under Plaintiff's novel theory of employers and employees. A 50% shareholder, obviously, is aligned in his interests with management and, in fact, as recognized by the National Labor Relations Board, *is management.* The theory that he can participate as an employee or as a representative of the employees, brings back the same

possibilities of abuse as existed prior to the passage of Section 302.

It is clear that the public policy as expressed by Congress in Section 302 militates against treating persons in such a clear management position as a half owner of a company, as an employee for purposes of Section 302.

2. The Determination by the Trustees That a 50% Shareholder Is an Employer, Is Reasonable and Not Arbitrary and Capricious.

Both the state and federal courts have developed a standard of review of decision and rules of the trustees of Section 302 trusts. Those rules and decisions will be reversed only if they are arbitrary and capricious. *Wilson v. Board of Trustees,* 564 F.2d 1299 (9th Cir. 1978); *Foley v. Devaney,* 528 F.2d 888 (3rd Cir. 1976); *Beam v. Masters, Mates & Pilots,* 511 F.2d 975 (2nd Cir. 1975); *Miniard v. Lewis,* 387 F.2d 864 (D.C. Cir. 1967); *French v. Construction Laborers Pension Trust,* 44 Cal.App.3d 479, 118 Cal. Rptr. 731 (1975).

Here the Trustees, in good faith, have determined that a 50% shareholder of a corporation is an employer and therefore ineligible for benefits under the Plan. It is undisputed that the determination was based on the concern over the requirements and policy behind Section 302, and that it was based upon the National Labor Relations Board's definition of "employer". In such circumstances, the Third Circuit has ruled in accord with the California Court that an amendment to the plan in the reasonable belief that it brought the plan in conformity with the Taft-Hartley Act is certainly not arbitrary and capricious. *Gomez v. Lewis,* 414 F.2d

1312 (3rd Cir. 1969). The California Court in this case adopted that view as an alternative rationale for their decision.

The case of *Reiherzer v. Shannon,* 581 F.2d 1266 (7th Cir. 1978) relied upon by Petitioner while superficially resembing this case, actually supports the application of the arbitrary and capricious standard and the reasonableness of the Trustees' determination here. In that case, it must be noted, the Trustees did not raise the issue of the legality of payments to an employer or the definition of the term "employer" in Section 302(c)(5).[8]

Rather the trustees in *Reiherzer* based their decision not on a percentage of stock owned or potential control exercised by the individuals but on declaration by the individual for tax purposes that he was self-employed. Thus while Reiherzer was a 90% stockholder and president, the trustees allowed him to participate in the trust until he made that declaration for tax purposes. The Seventh Circuit ruled that in those circumstances, where the degree of ownership and potential control remained the same throughout the period it was arbitrary and capricious for the trustees to change Reiherzer's status in the plan. In light of the trustees' failure to raise the Section 302 issue in that case, the result is certainly not surprising.

Here, however, the Trustees have looked precisely to the degree of ownership and potential control of the individual and have accepted the National Labor Relations Board standards as to the degree of such

[8]The case of *Sanchez v. Board of Trustees,* 359 So.2d 1279 (La.Supr.Ct. 1978) similarly failed to analyze the policy behind Section 302.

ownership that aligns an individual as management or as an employer. Lines must inevitably be drawn in a trust such as this, separating the eligible from the ineligible. *Roark v. Lewis,* 401 F.2d 425, 528-529 (D.C. Cir. 1968); *Wilson v. Board of Trustees, supra* at 1302. In such circumstances, it is clear that the Trustees' determination is reasonable and supported by a rational basis as found by the Court below, and therefore, perfectly lawful under the standards adopted under Section 302.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. GILBERT,
ROBERT W. GILBERT, a Law Corporation,
Attorneys for Respondents.

Of Counsel:
JAMES B. GOODMAN,
KENNETH J. SACKMAN.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1978.

_____

_____

MOTION FILED
DEC 20 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-824

HAROLD BRAUER,
Petitioner

v.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,
Respondent

MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE MOTION PICTURE INDUSTRY PENSION PLAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

RICHARD C. WHITE
611 West Sixth Street
Los Angeles, California 90017

Of Counsel
O'MELVENY & MYERS
CLYDE E. TRITT
CATHERINE B. HAGEN
611 West Sixth Street
Los Angeles, California 90017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* 1

BRIEF *AMICUS CURIAE* 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THIS WRIT 6

I. THE DECISION OF THE COURT BELOW, WHICH INTERPRETS THE DEFINITION OF "EMPLOYEE" AS USED IN SECTION 302(c)(5) OF THE NATIONAL LABOR RELATIONS ACT SO AS TO EXCLUDE PERSONS OWNING 50 PERCENT OR MORE OF THEIR CORPORATE EMPLOYERS' STOCK, RAISES A SUBSTANTIAL FEDERAL QUESTION, CREATES A DIRECT CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS CONSTRUING SECTION 302(c)(5), AND DIRECTLY CONFLICTS WITH THE INTERNAL REVENUE CODE 6

A. *The Decision Below Raises a Substantial Federal Question* 6

B. *The Decision Below Ignores the Guidance of This Court and Conflicts with other Decisions Construing Section 302(c)(5)* 7

C. *The Decision Below is in Direct Conflict with the Definition of "Employee" Used by the Internal Revenue Service in Regulating Pension Plans* 8

II. UNTIL THE DEFINITION OF "EMPLOYEE" IN SECTION 302(c)(5) IS RESOLVED BY THIS COURT, FIDUCIARIES OF PENSION PLANS GOVERNED BY ERISA ARE FACED WITH A DILEMMA WHICH PRESENTS SERIOUS CONSEQUENCES BOTH TO PLAN PARTICIPANTS AND TO THEMSELVES 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 7, 8

Brauer v. Sheet Metal Workers Pension Plan, 82 Cal. App. 3d 159, *appeal denied*, ... Cal. 3d .... (Aug. 24, 1978) 6, 7

Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) 7

Raley v. Ohio, 360 U.S. 423 (1959) 7

Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978) 8

Sanchez v. Trustees of Pension Plan, 359 So. 2d 1279 (La. 1978) 8

Statutes:

Employee Retirement Income Security Act of 1974, 88 Stat. 829 10

Internal Revenue Code, 26 U.S.C. § 1 *et seq.* 9

Section 401, 26 U.S.C. § 401 9

Section 501, 26 U.S.C. § 501 9

National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.* ..... 2, *passim*

Section 2(3), 29 U.S.C. § 152(3) 6, 8

Section 9(b), 29 U.S.C. § 159(b) 8

Section 302(c)(5), 29 U.S.C. § 186(c)(5) ..5, *passim*

28 U.S.C. § 1257(3) 6

Rule:

U.S. Sup. Ct. Rule 42, 28 U.S.C.A. 1, 4

Treatise:

R. Stern & E. Gressman, Supreme Court Practice § 4.9 (4th ed. 1969) 7

In The

Supreme Court of the United States

October Term, 1978

No. 78-824

Harold Brauer,

Petitioner

v.

Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada,

Respondent

MOTION OF THE MOTION PICTURE INDUSTRY PENSION PLAN TO SUBMIT BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Motion Picture Industry Pension Plan (herein "MPIPP") moves this Court for leave to file the accompanying brief

as *Amicus Curiae* supporting Petitioner Brauer. In support of this motion, the MPIPP shows as follows:

1. The MPIPP is a pension plan governed by the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (herein "ERISA"), and created pursuant to collective bargaining agreements. The MPIPP has been in existence since 1953 and has approximately 31,500 participants, all of whom work in the motion picture industry. The MPIPP's principal place of business is Los Angeles, California.

2. The MPIPP is subject to the provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (herein the "Act").

3. The MPIPP has as participants the employees (including some supervisory employees) of many motion picture studios. Some of these participants have formed, for federal tax purposes, corporations in which each participant works as his own corporation's employee. A participant so incorporated generally owns 100 percent of the stock of his corporation, and generally the participant is the corporation's only employee. The participant's corporation contracts with the motion picture studios to provide the participant's services, and the participant's pension contributions are made through the participant's corporation. If the opinion of the court below is allowed to stand, the status of a substantial number of the MPIPP's participants, those who own 50 percent or more of their own corporations, is completely uncertain because of the conflicting decisions discussed in the brief *Amicus Curiae*. They may or may not be unlawful participants.

4. Persons working in the motion picture industry in jobs covered by collective bargaining agreements are required to contribute to the MPIPP through employer withholding from their compensation, and the employer

is required to make contributions to the MPIPP on behalf of such persons. Moreover, union membership is required by pertinent collective bargaining agreements as a condition of employment. An employee of a motion picture studio working through his wholly-owned corporation is therefore required to contribute to the MPIPP as a condition of employment, even though the decision of the court below would make it unlawful for the MPIPP to accept such contributions. The MPIPP, as a fiduciary with respect to these shareholder-participants, has a serious interest in having this Court settle the question of these participants' status.

5. The issues raised in the court below are of grave concern to pension plans throughout the United States. The MPIPP is typical of pension plans governed by ERISA and subject to Section 302(c)(5) of the Act, and it is a common practice in many industries, notably the construction and motion picture industries, for employees to belong to a union within their industry and to own stock in their corporate employers as well.

6. The decision of the court below is in direct conflict with decisions of other courts which have examined the issue of pension plan participant eligibility under Section 302(c)(5). This conflict presents a serious problem to the MPIPP and other plans. That problem is whether to continue to accept contributions from participants who own 50 percent or more of their corporate employers, or whether to follow the decision of the court below and exclude such participants from further participation. The serious nature of the consequences of this choice is underscored by the fiduciary responsibility imposed by ERISA upon pension plan trustees with respect to the shareholder-participants whose further participation is in question.

7. The MPIPP has requested but has not obtained consent of the Respondent to file the brief *Amicus Curiae* that follows. Therefore, as required by Supreme Court Rule 42, the MPIPP submits this Motion for leave to file the brief *Amicus Curiae.*

WHEREFORE, it is respectfully moved that the MPIPP be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

RICHARD C. WHITE
611 West Sixth Street
Los Angeles, California
90017

Of Counsel
O'MELVENY & MYERS
CLYDE E. TRITT
CATHERINE B. HAGEN
611 West Sixth Street
Los Angeles, California 90017

December 19, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-824

HAROLD BRAUER,
Petitioner

v.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,
Respondent

BRIEF *AMICUS CURIAE* OF THE MOTION PICTURE INDUSTRY PENSION PLAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Motion Picture Industry Pension Plan (herein "MPIPP") respectfully submits this brief *Amicus Curiae* in support of the petition for a writ of certiorari in this case filed by Harold Brauer.

STATEMENT OF THE CASE

The facts as set forth in the briefs of the parties to this case are sufficient for the *Amicus Curiae* to present its position as a friend of the Court. One key point, however, should be stressed. The California Court of Appeal, in the case below,* defined "employee" by examining only National Labor Relations Board bargaining unit cases and the Board's interpretation therein of "employee" under 29 U.S.C. § 152(3) (herein "Section 2(3)") of the National Labor Relations Act (herein the "Act"). The California court failed to consider decisions of both this Court and the United States Courts of Appeals that have held that the 29 U.S.C. § 186(c)(5) (herein "Section 302(c)(5)") definition of "employee" for pension plan purposes is *broader* than the Section 2(3) definition of "employee" for bargaining unit purposes.

REASONS FOR GRANTING THIS WRIT

I. THE DECISION OF THE COURT BELOW, WHICH INTERPRETS THE DEFINITION OF "EMPLOYEE" AS USED IN SECTION 302(c)(5) OF THE NATIONAL LABOR RELATIONS ACT SO AS TO EXCLUDE PERSONS OWNING 50 PERCENT OR MORE OF THEIR CORPORATE EMPLOYERS' STOCK, RAISES A SUBSTANTIAL FEDERAL QUESTION, CREATES A DIRECT CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS CONSTRUING SECTION 302(c)(5) AND DIRECTLY CONFLICTS WITH THE INTERNAL REVENUE CODE.

A. The Decision Below Raises a Substantial Federal Question.

This Court has jurisdiction to decide the instant case under 28 U.S.C. § 1257(3) which provides for a writ of certiorari where "any title, right, privilege or immunity is specially set up or claimed under the . . . statutes of . . . the United States."

The court below decided a federal question, the interpretation of "employee" in Section 302(c)(5) of the Act, as the basis for its holding for Respondent herein. The court stated,

> "In our view, the matter turns upon the questions whether one is an employee so as to satisfy the Act's requirements and *whether that determination is solely ascertained by reference to federal rather than state law. The latter question is answered clearly in the affirmative.*" 82 Cal. App. 3d at 163 (emphasis supplied).

There can be no question as to the proper presentation of a federal claim when the highest state court to consider the federal claim expressly passes on it as occurred herein. *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 299 (1971); *Raley v. Ohio,* 360 U.S. 423, 436 (1959).

B. The Decision Below Ignores the Guidance of This Court and Conflicts with Other Decisions Construing Section 302(c)(5).

Another valid reason for the granting of certiorari by this Court is the presence of a direct conflict between the decision of the highest court of a state and that of a federal court of appeals. R. Stern & E. Gressman, Supreme Court Practice § 4.9 (4th ed. 1969).

In deciding that the definitions of "employee" derived from bargaining unit cases had to be the definitions to be used in interpreting Section 302(c)(5), the court below ignored the teaching of this Court that the definition of "employee" as that term is used in Section 302(c)(5) is broader and more inclusive than the definition of "employee" to be used in a bargaining unit context. In *Allied*

* Brauer v. Sheet Metal Workers Pension Plan, 82 Cal. App. 3d 159, *appeal denied,* .... Cal. 3d .... (Aug. 24, 1978).

Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 170 (1971), this Court stated that "there is no anomaly in the conclusion that retired workers are 'employees' within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but are not 'employees' whose ongoing benefits are embraced by the bargaining obligations of § 8(a)(5)."*

More specifically, the decision of the court below conflicts with the recent decision of the United States Court of Appeals for the Seventh Circuit in *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978), holding that supervisors, even though they are specifically excluded from the Section 2(3) definition of "employees" for bargaining unit purposes, are nevertheless "employees" for Section 302(c)(5) purposes. *Reiherzer*, it is submitted, makes it clear that the California Court of Appeal's assumption that "employee" is defined uniformly throughout the Act was indeed erroneous.

The present uncertainty faced by pension plans such as the MPIPP is further exacerbated by directly conflicting decisions in other jurisdictions. For example, in *Sanchez v. Trustees of Pension Plan*, 359 So. 2d 1279 (La. 1978), the Louisiana Supreme Court recently held that a 50 percent corporate shareholder was an employee of his closely-held corporation for Section 302(c)(5) purposes.

* The National Labor Relations Board's rationale for excluding 50 percent shareholders from voting in representation elections is grounded on considerations such as maintaining a community of interest among employee voters; avoiding the inhibition of other voting employees from enjoying "the fullest freedom in exercising the rights guaranteed" under Section 9(b) of the Act that might otherwise be present; and avoiding the obvious conflict which would occur by permitting a person to vote and be represented by a union when that same person may also possess the authority to determine an employer's labor policy. None of these considerations attach to an interpretation of "employee" under Section 302(c)(5).

C. The Decision Below is in Direct Conflict with the Definition of "Employee" Used by the Internal Revenue Service in Regulating Pension Plans.

Pension plans such as the MPIPP must qualify under the Internal Revenue Code, 26 U.S.C. § 1, *et seq.* (herein the "Code") in order to be tax-exempt. Section 501 of the Code requires that a pension plan comply with the provisions of Section 401(a) of the Code. Section 401(a)(2) provides that a tax-exempt trust fund must be "for the exclusive benefit of [an employer's] employees or their beneficiaries." The Section 401(a)(2)* language was in effect in 1947 when Congress added Section 302(c)(5) to the National Labor Relations Act, providing that payments out of Section 302(c)(5) pension funds be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." The fact that the language of Section 401(a)(2) of the Code is nearly identical to the language of Section 302(c)(5) of the National Labor Relations Act is a strong indication that Congress intended the later-passed Section 302(c)(5) to limit the class of qualified pension plan beneficiaries in the same manner as the class was limited by the qualification provisions of the Internal Revenue Code.

Section 401(a)(2) has been consistently interpreted as allowing shareholders, even sole shareholders, to be qualified pension plan participants so long as the pension plan does not discriminate in favor of shareholder-participants. *See* 26 U.S.C. § 410(b)(1)(B); Treasury Regulation § 1.401-1(b)(3). Thus, to interpret the language of Section 302(c)(5) as precluding participation in a Section 302(c)(5) pension trust by employees owning more than 50 percent of their corporate employers, as did the court below,

* In 1947 the language that is today codified as 26 U.S.C. § 401(a)(2) was codified as 26 U.S.C. § 165(a).

creates yet another conflict in the law relating to pension plans.

II. UNTIL THE DEFINITION OF "EMPLOYEE" IN SECTION 302(c)(5) IS RESOLVED BY THIS COURT, FIDUCIARIES OF PENSION PLANS GOVERNED BY ERISA ARE FACED WITH A DILEMMA WHICH PRESENTS SERIOUS CONSEQUENCES BOTH TO PLAN PARTICIPANTS AND TO THEMSELVES.

Under the Employee Retirement Income Security Act of 1974 (herein "ERISA"), pension plan trustees are charged with fiduciary responsibilities to all plan participants, including shareholder-participants.* The fiduciaries' dilemma is that they must either permit participating shareholders to continue to participate and thus accept contributions which may be illegal, or they must exclude shareholder-participants from participation and deny pension benefits which were intended to be protected by ERISA. If the first course of action is followed, the plan fiduciaries may incur personal liability for improper payment of plan assets to shareholder-participants in the form of pension benefits. ERISA § 409. If the second course of action is followed, the plan fiduciaries will, at the very least, face a flood of litigation from shareholder-participants who, in good faith for many years and in conformity with industry practice, have rendered personal services through their wholly-owned corporations. Moreover, the remedy suggested by the Court below, the restoration of contributions, is prohibited by ERISA for contributions made after ERISA's effective date, January 1, 1975, except for those contributions made under mistake of fact within the preceding year. (ERISA § 403(c)(2)(A)).

* ERISA specifically recognizes that shareholders are proper plan participants. 26 U.S.C. § 410(b)(1)(B).

CONCLUSION

For the reasons stated above, and those stated by Petitioner Brauer, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

RICHARD C. WHITE
611 West Sixth Street
Los Angeles, California
90017

Of Counsel
O'MELVENY & MYERS
CLYDE E. TRITT
CATHERINE B. HAGEN
611 West Sixth Street
Los Angeles, California 90017

December 19, 1978

Service of the within and receipt of a copy thereof is hereby acknowledged this ..... day of December, A. D. 1978.

_____

_____